

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

* * *
Case No. 3:18-CR-00084-LRH-CBC
ORDER

v.

GREGORY BAUER ROBERTS,

Defendant.

Before the court are six motions filed by the defendant, Gregory Bauer Roberts: (1) motion to suppress evidence of the defendant's stop, arrest, and search of his vehicle (ECF No. 33); (2) motion to suppress or, in the alternative, motion to exclude from trial evidence seized from the defendant's jail cell (ECF No. 32); (3) motion for early disclosure of *Jencks* material and timely production of *Brady/Giglio* material (ECF No. 35); (4) motion for reasonable notice of Federal Rule of Evidence 404(b) evidence (ECF No. 36); (5) motion to inspect and produce files of federal law enforcement agents and officers (ECF No. 38); and (6) motion to permit supplemental attorney examination or questioning of prospective jurors (ECF No. 39). The Court's order on all pending motions now follows.

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1 **I. BACKGROUND**

2 On August 23, 2018, at approximately 11:17 a.m., a man attempted to rob the Wells
 3 Fargo bank located at 401 Keystone Avenue in Reno, Nevada. ECF No. 33-6. The man,
 4 described as a white man, medium height and weight, carried a black bag and wore khaki or tan
 5 pants, black/gray gloves, a dark-colored face mask, mirrored “Aviator” style sunglasses, and a
 6 unique white circular pendant with a swirl pattern. *Id.*, ECF No. 44-2 at 2. The man demanded
 7 the cashier give him money in large bills, but the employees refused, remained behind the
 8 barrier, and informed the man they were calling 911. ECF No. 33-6. The would-be robber then
 9 left the bank. *Id.* A customer followed him out of the bank and took cellphone video of him as he
 10 left. *See* ECF No. 61. The suspect crossed the street away from the bank, and departed the scene
 11 in a white SUV, described as a Jeep Grand Cherokee with unknown plates and tinted windows.
 12 *Id.* Government’s Exhibits 2a-2c; ECF No. 33-6. Officers investigated the attempted robbery, but
 13 no suspects were identified that day.

14 The following day, on August 24, 2018, at approximately 10:00 a.m., a man robbed the
 15 Wells Fargo bank located at 776 Tahoe Boulevard in Incline Village, Nevada. ECF No. 33-1.
 16 The man, identified by video and witness statements, was white and believed to be between 30
 17 and 40 years old. ECF No. 33-6. He wore a dark-colored face mask, a dark hat with gray duct
 18 tape covering the logo, tan pants, mirrored “Aviator” style sunglasses, and dark gloves. *Id.* He
 19 walked into the bank carrying a black bag and demanded cash in large bills from the cashiers.
 20 *Id.*; ECF No. 33-1. The cashiers complied and the man left the bank with approximately
 21 \$14,600.00. ECF No. 33-1. A bank manager followed the robber out of the bank and saw him
 22 remove his mask revealing that he had “short brown with a little gray/blondish hair.” *Id.* The
 23 man was seen leaving the area in a white Jeep Grand Cherokee with tinted windows, and a
 24 California license plate beginning with the number and letter “7X” and possibly “HD.” ECF No.
 25 33-6.

26 Law enforcement officers responded to the bank and began investigating the incident.
 27 ECF No. 33-1. Video obtained from the bank, the neighboring convenience store, and
 28 responding officer’s dash cameras, showed a white Jeep Grand Cherokee, with tinted windows,

1 chrome mirrors and dark rims, traveling away from the bank on Tahoe Boulevard. ECF No. 33-
 2 6.

3 At approximately 1:52 pm (almost 4 hours after the robbery), Washoe County Sheriff's
 4 Deputies Hill and Hernandez were traveling toward Incline Village on the Mt. Rose Highway
 5 when they observed a white Jeep Grand Cherokee, matching the suspect vehicle's description—a
 6 white 2015 or newer Jeep Grand Cherokee with possible partial California plate 7XHD—
 7 traveling in the opposite direction. ECF No. 33-3. Deputy Hill also observed that the man driving
 8 the vehicle matched the suspect description—a white, approximately 40-year-old male, with
 9 mirrored sunglasses. *Id.* Deputy Hill turned his patrol car around and accelerated back towards
 10 the Mount Rose Summit where he observed the suspected vehicle pulled over and improperly
 11 parked at the summit recreation area parking lot. *Id.* The driver had exited the vehicle and was
 12 walking briskly towards the public restrooms, hikers and other rest stop users. *Id.*; ECF No. 33-4,
 13 Deputy Hill's Body Camera, at 20:52:00–20:54:36Z. Deputies Hill and Hernandez quickly
 14 approached and placed the driver at gunpoint, ordered him to the ground and handcuffed him. *Id.*
 15 The driver asked if he was under arrest and the officers responded that he was being detained.
 16 ECF No. ECF No. 33-2; ECF No. 33-5, Deputy Hernandez's Body Camera, at 20:52:52Z–
 17 20:53:12Z.

18 The driver initially refused to identify himself to the deputies and invoked his Fifth
 19 Amendment right to an attorney. ECF Nos. 33-2; 33-3. Deputies informed the driver that they
 20 could continue to request personal information after he requested an attorney and that a failure to
 21 identify himself could result in a criminal charge. ECF No. 33-5, Deputy Hernandez's Body
 22 Camera, at 20:53:57Z–20:56:06Z. After approximately 17 minutes, the suspect identified himself
 23 as Greg Roberts, and that he was on probation. *Id.* at 21:08:30Z–21:08:58Z. Deputy Hill
 24 confirmed his identity, and completed a records check confirming that Roberts was on probation
 25 from a 2017 conviction in California for second degree robbery. ECF Nos. 33-1; 33-3; 33-6.

26 Additional law enforcement officers arrived at the scene, including Detective Lear, one of
 27 the investigating officers of the Incline Village robbery. ECF No. 33-6. Officer Lear took
 28 pictures of Roberts who was wearing dark shorts, a red/multicolored poncho over a gray shirt, a

1 black and gold colored hat, mirrored “Aviator” style sunglasses, and a white, circular pendant
 2 necklace with a swirl pattern that appeared to be the same as the one worn by the attempted
 3 robber of the Wells Fargo in Reno the day before. ECF Nos. 33-1; 33-3; 33-6. Detective Lear
 4 also photographed the exterior of the car, which was a white Jeep Grand Cherokee, California
 5 license plate “7XOY902,” with tinted windows, chrome mirrors, and dark gray wheel rims. ECF
 6 No. 33-6. A red backpack and duct tape were seen in plain view inside the vehicle. *Id.*; ECF No.
 7 33-1

8 Approximately 50 minutes into the stop, Detective Lear began a search of Roberts’
 9 vehicle. ECF No. 33-4, Deputy Hill’s Body Camera, at 21:40:23Z–21:48:30Z. Roberts objected
 10 and articulated that he did not consent to the search. *Id.* At this time, Deputy Hill took Roberts to
 11 a patrol car and placed him under arrest. *Id.*

12 Roberts was charged on August 28, 2018, in a criminal complaint with 2 counts:
 13 Attempted Bank Robbery on August 23, 2018, and the Bank Robbery on August 24, 2018, under
 14 18 U.S.C. § 2113(a). ECF No.1. Subsequently, the Grand Jury indicted Roberts on both robbery
 15 counts. ECF No. 17.

16 A. Cell Search of September 18, 2018

17 The court ordered Roberts detained pretrial in the Washoe County Jail where he has
 18 remained since his arrest. ECF No 13. On September 18, 2018, Deputy Wallitner conducted a
 19 standard cell search of Roberts’ jail cell. ECF No. 32-1; ECF No. 61, Testimony of Deputy
 20 Wallitner. Deputy Wallitner confiscated several hand-written documents and address books from
 21 the personal bins of Roberts and his cell mate, Gunnar Zipp. *Id.* Deputy Wallitner provided these
 22 documents to Detective Lear, who interviewed Zipp regarding them. *Id.* Detective Lear provided
 23 the documents to the prosecutor, who subsequently disclosed them during discovery. The
 24 Defendant alleges these documents contain privileged information protected under attorney-
 25 client/work-product and alleges the Government has violated the defendant’s Sixth Amendment
 26 right to counsel. *See* ECF No. 32.

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1 **II. DISCUSSION**

2 **A. The court denies defendant's motion to suppress evidence from the stop and arrest
3 of the defendant and the warrantless search of his vehicle.**

4 On August 24, 2018, the defendant was stopped by two Washoe County Sheriff's Office
5 deputies at the recreation area parking lot on the Mount Rose Summit. The defendant argues that
6 evidence obtained during this stop and subsequent search of his vehicle violated his Fourth
7 Amendment rights. ECF No. 33 at 1. The defendant moves the court to suppress the evidence for
8 the following reasons: (1) the level of force used in the initial stop and detention immediately
9 converted the stop into an arrest not supported by probable cause; (2) law enforcement never
10 developed probable cause to arrest the defendant during this detention; and (3) law enforcement
11 did not have probable cause to search defendant's car. *Id.* at 6-12. The court will discuss each in
12 turn.

- 13 i. Officers properly conducted a *Terry* stop of the defendant and deputies' use of
14 force did not automatically convert Roberts' detention into an arrest given the
 immediate public safety concerns.

15 The defendant argues that he was unconstitutionally arrested when he was stopped at
16 gunpoint, handcuffed, and detained by officers who lacked probable cause to arrest. The court
17 finds that the officers stop and detention of the defendant was proper under *Terry v. Ohio* and its
18 progeny, and their use of force did not convert the detention automatically into an arrest. 392
19 U.S. 1, 17 (1968).

20 In general, “[a] *Terry* stop involves no more than a brief stop, interrogation and, under
21 proper circumstances, a brief check for weapons.” *United States v. Robertson*, 833 F.2d 777, 780
22 (9th Cir. 1987). “If the stop proceeds beyond these limitations, an arrest occurs, which requires
23 probable cause.” *United States v. Miles*, 247 F.3d 1009, 1012 (9th Cir. 2001). However,
24 “intrusive and aggressive police conduct” may be allowed “without deeming it an arrest in those
25 circumstances when it is a *reasonable* response to legitimate safety concerns on the part of the
26 investigating officers.” *Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996) (emphasis in
27 original). But the court “must also consider the liberty interest all Americans cherish—

1 specifically the freedom from unreasonable searches and seizures guaranteed by the Fourth
 2 Amendment to our Constitution.” *Id.* at 1187.

3 There is no bright-line rule for the court to apply; rather, the analysis is dependent on
 4 whether the inherent danger of the situation justified the officer’s intrusive actions. *See id.* “In
 5 determining the severity of the intrusion and the aggressiveness of the police action,” the court
 6 considers whether the suspect was handcuffed, whether police drew weapons, and whether the
 7 officers “physically restrict[ed] the suspect’s liberty.” *Id.* at 1188-89. While generally “drawing
 8 weapons and using handcuffs are not part of a *Terry* stop,” *Miles*, 247 F.3d at 1012, because the
 9 court considers “both the inherent danger of the situation and the intrusiveness of the police
 10 action,” such conduct “will not automatically convert an investigatory stop into an arrest that
 11 requires probable cause,” *Lambert*, 98 F.3d at 1186 (emphasis in original). *See also Gallegos v.*
 12 *City of Los Angeles*, 308 F.3d 987, 991 (9th Cir. 2002) (“For police to draw their guns in
 13 ordering Gallegos from the truck, when unsure if he was armed; for police to handcuff Gallegos
 14 in the back of a . . . patrol car, when unsure of who he was; and for police to bring him back to
 15 Melbourne Ave.—that was not, under the circumstances, an unreasonable way of finding out if
 16 Gallegos was the person they were looking for.”). The court also considers the “reasonableness
 17 of the police conduct in light of” the following factors: (1) was the suspect uncooperative or did
 18 they take action at the scene that raised a reasonable possibility of danger or flight; (2) did the
 19 police have information that the suspect was currently armed; (3) did the stop closely follow a
 20 violent crime; and (4) did the police have information that a crime that may involve violence was
 21 about to occur. *Id.* at 1189.

22 Here, when Deputies Hill and Hernandez initiated the stop of the defendant, they were
 23 aware of the following information: (1) a man, described as a white male, robbed the Wells
 24 Fargo located at 776 Tahoe Boulevard in Incline Village, Nevada, at approximately 10:00 a.m.
 25 that day; (2) the suspected bank robber drove away in a white Jeep Grand Cherokee with a
 26 California license plate number starting with “7XHD”; (3) the suspect was possibly armed with a
 27 firearm; (4) Deputies Hill and Hernandez passed a white Jeep Grand Cherokee with partial
 28 California Plate beginning with “7X” heading down the Mount Rose Highway toward Reno; and

1 (5) upon passing officers, the driver pulled the vehicle over at the Mount Rose Summit recreation
 2 area parking lot, parked the vehicle improperly, exited it and began walking briskly away from
 3 the vehicle toward a number of rest stop users. Based on these facts, the officers' actions—
 4 placing the defendant at gun point, ordering him to the ground, and handcuffing him—while
 5 extremely intrusive and aggressive police conduct, were reasonable in light of the public safety
 6 concerns and did not automatically convert the stop into an arrest.

7 For police to draw their guns in ordering Roberts to stop at a time when they believed he
 8 was a suspected bank robber, may be armed and was fleeing from the officers was not
 9 unreasonable; and for police to handcuff and keep him handcuffed for approximately 50 minutes
 10 was not, under the circumstances, unreasonable. The defendant's actions at the scene raised a
 11 reasonable possibility of both danger and flight—the defendant had pulled over the suspected
 12 escape vehicle and left it in an unusual manner, had exited it and was walking briskly away
 13 towards hikers and other recreation area users, and he was possibly armed. The inherent danger
 14 of the situation and the public safety concern the suspect potentially posed, clearly justified the
 15 intrusiveness of the police conduct. Accordingly, the court finds that the officers had reasonable
 16 cause to stop and detain the defendant.

17 ii. The officers' detention of the defendant was reasonable in duration, during which
 18 they diligently pursued their investigation.

19 The court finds that the detention of Roberts was reasonable in duration. “[A]n
 20 investigative detention must be temporary and last no longer than is necessary to effectuate the
 21 purpose of the stop.” *Florida v. Royer*, 460 U.S. 491, 500 (1983). To determine if the stop was
 22 longer than necessary, the court considers “whether the police diligently pursued a means of
 23 investigation that was likely to confirm or dispel their suspicions quickly.” *United States v.*
 24 *Sharpe*, 470 U.S. 675, 686 (1985).

25 Here, Deputies Hernandez and Hill made contact with the defendant at approximately
 26 1:52pm. The deputies ordered him to the ground. He asked if he was being arrested and was
 27 informed by Deputy Hernandez that he was being detained. Deputy Hernandez conducted a brief
 28 pat-down for weapons, placed the defendant in handcuffs, and sat him down on the curb. Roberts

1 requested to speak with an attorney and refused to identify himself for approximately 17 minutes
 2 into the stop. At that point, the defendant identified himself as Greg Roberts. Deputy Hill then
 3 verified his identify, ran a records check, and contacted the defendant's probation officer in
 4 California. Additional officers arrived at the scene, took photos of the defendant, the defendant's
 5 vehicle, and looked in the windows of the vehicle. From the time deputies initiated the stop until
 6 they placed him under arrest, approximately 50 minutes passed.

7 Where a suspect is uncooperative or contributes to a delay in the detention or
 8 investigation, as the defendant did here, a total detention time of 50 minutes was not
 9 unreasonable. *See United States v. Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974) ("[W]here the
 10 suspects' own unsatisfactory responses to legitimate police inquiries were the principal cause of
 11 the extended detainment, the delay of slightly over an hour was not unreasonable."). Here,
 12 Roberts refused to identify himself and prevented officers from verifying his identity for 17
 13 minutes. The officers then diligently confirmed his identity, took photographs of the defendant
 14 and his vehicle and compared that information to that collected by officers over the 4-hour
 15 period between the robbery and the stop. Nothing in the record shows officers detained the
 16 defendant longer than was reasonably necessary for the purposes of the stop—investigating the
 17 defendant as a suspect for the Incline Village bank robbery. Further, the Supreme Court's ruling
 18 in *Rodriguez v. United States* is inapplicable in this case. 135 S. Ct. 1609 (2015). While officers
 19 may not "extend an otherwise-completed traffic stop" to wait for a drug sniffing dog, this stop
 20 was neither a traffic stop nor was it extended past the completed end of the stop to wait for
 21 further investigation. *Id.* at 1614. Given the totality of the circumstances and the nature of the
 22 crime of which the defendant was suspected, the court finds that such detention was reasonable.

23 iii. Even if the officers' use of force converted the stop and detention into an arrest,
 24 the officers had probable cause to arrest him at the time of the stop, and certainly
developed probable cause to arrest during the 50-minute detention.

25 A warrantless arrest on a public street is proper if supported by probable cause. *See*
 26 *United States v. Watson*, 423 U.S. 411, 416-24 (1976). "Probable cause exists if under the
 27 totality of the circumstances known to the officer, a prudent person would have concluded there
 28 was a fair probability that the defendant committed a crime." *United States v. Carranza*, 289

1 F.3d 634, 640 (9th Cir. 2002) (quotation marks and citation omitted). “Whether there is a fair
 2 probability depends upon the totality of the circumstances, including reasonable inferences, and
 3 is a ‘commonsense, practical question.’ Neither certainty nor a preponderance of the evidence is
 4 required.” *United States v. Kelley*, 482 F.3d 1047, 1050 (9th Cir. 2007) (citation omitted).
 5 Further, in determining whether the officers had probable cause, the court may consider the
 6 collective knowledge doctrine, which allows courts to “combine” facts known to different
 7 officers, even if those facts are not communicated to each of the officers. *See United States v.*
 8 *Ramirez*, 473 F.3d 1026, 1034-35 (9th Cir. 2007) (citing *United States v. Sutton*, 794 F.2d 1415,
 9 1427 (9th Cir. 1986)).

10 When Deputies Hill and Hernandez stopped Roberts, they had probable cause to arrest.
 11 At this time the deputies had (1) a positive identification of the suspect vehicle—a white, Jeep
 12 Grand Cherokee with a California license plate starting with “7X”—which was attempting to
 13 leave the Incline Village area on one of only three possible routes out of Incline Village; (2) the
 14 driver matched the description of the bank robber; (3) the furtive conduct of the driver—pulling
 15 over at the first possible stop after passing sheriffs, parking improperly, exiting the vehicle and
 16 walking briskly away toward the prospective cover of innocent people and buildings—and; (4)
 17 the suspect was possibly armed with a gun.

18 Further, the court may consider the collective knowledge known to all officers involved
 19 in the investigation, whether or not all of that information was conveyed to the arresting
 20 deputies. At the time of the stop, officers collectively knew the following information: (1) a man
 21 attempted to rob the Wells Fargo bank located at 401 Keystone Avenue, in Reno, Nevada, on
 22 August 23, 2018, at approximately 11:17 a.m.; (2) this suspected bank robber was described as a
 23 white man, medium height and weight, carried a black bag, and was wearing khaki or tan pants,
 24 black/gray gloves, a dark colored face mask, mirrored “Aviator” style sunglasses, and a unique
 25 white circular pendant with a swirl pattern; (3) this suspected bank robber left the Reno bank in a
 26 white SUV, described as a Jeep Grand Cherokee with unknown plates and tinted windows; (4)
 27 on August 24, 2018, a man robbed the Wells Fargo at 776 Tahoe Boulevard in Incline Village,
 28 Nevada, at approximately 10:00 a.m.; (5) this suspected robber was described as a white male

1 between 30 and 40 years old, with short brown with a little gray/blondish hair; (6) he carried a
2 black bag and wore a dark colored mask over his face, dark hat with gray duct tape covering the
3 logo, tan pants, mirrored “Aviator” style sunglasses, and dark gloves; (7) this suspected bank
4 robber left the bank with approximately \$14,600, and drove away in a white Jeep Grand
5 Cherokee with tinted windows, chrome mirrors and dark rims, and a California license plate
6 number starting with “7X”; and (8) was last seen traveling northbound on the Mount Rose
7 Highway toward Reno.

8 Under these circumstances and facts known both individually by Deputies Hill and
9 Hernandez and collectively by the officers involved in the investigations, the court finds that a
10 prudent person could have concluded at the time of the stop that there was a fair probability that
11 the Roberts committed a crime. Therefore, the officers had probable cause at that time to arrest
12 Roberts.

13 Further, the court has no question that during the approximately 50-minute detention of
14 Roberts, the officers developed additional probable cause to arrest him. During this time, officers
15 gained the following additional information: (1) the driver of the vehicle, identified as Greg
16 Roberts, had a consistent height and weight as the suspected bank robber, and was wearing
17 mirrored “Aviator” style sunglasses consistent with the suspect in both robberies; (2) Roberts
18 was wearing a unique white circular pendant with the same swirl pattern, shape and design as
19 that worn by the attempted Reno bank robber; (3) in plain view in the vehicle, officers saw a roll
20 of duct tape consistent with the suspected Incline Village bank robber wearing a hat with the
21 logo covered in gray duct tape; and finally (4) Roberts had a history of robbery, and was
22 currently on probation for second degree robbery in California.

23 The court has no question that the arresting officers had probable cause to arrest the
24 defendant. At that time, a prudent person would have concluded there was a fair probability that
25 defendant had committed both the Reno and Incline Village bank robberies. Accordingly, the
26 officers’ warrantless arrest of the defendant was properly based on probable cause and did not
27 violate the defendant’s Fourth Amendment rights.

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1 iv. Law enforcement had probable cause to search defendant's vehicle under the
 2 automobile exception.

3 While a warrant is generally required to search a vehicle, "the ultimate touchstone of the
 4 Fourth Amendment is 'reasonableness,' [meaning] the warrant requirement is subject to certain
 5 exceptions." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (citing *Flippo v. West*
 6 *Virginia*, 528 U.S. 11, 13 (1999) (*per curiam*); *Katz v. United States*, 389 U.S. 347 (1967)).
 7 Under the automobile exception, law enforcement may conduct a warrantless "search of an
 8 automobile and the containers within it where they have probable cause to believe contraband or
 9 evidence," will be found. *United States v. Cervantes*, 703 F.3d 1135, 1138-39 (9th Cir. 2012).

10 As articulated above, the officers had probable cause to arrest the defendant when they
 11 initially stopped him, but certainly after the officers confirmed that the defendant's vehicle
 12 matched the suspected vehicle, confirmed that he matched the suspect's description, saw he was
 13 wearing "Aviator" style sunglasses, was also wearing a unique spiral, swirl shaped pendant
 14 necklace identical to the that of the Reno robber, and viewed duct tape in plain view in the
 15 vehicle. At that point, the detention clearly changed to an arrest. Accordingly, the officers'
 16 search of his vehicle over his objection was a search incident to arrest authorized under the
 17 automobile exception. Simply because the search began before the officers articulated to Roberts
 18 that he was under arrest does not change the court's analysis. Probable cause existed well before
 19 the announcement of arrest. Therefore, based on the totality of the circumstances, the court finds
 20 that Roberts' Fourth Amendment rights were not violated when the officers searched the vehicle
 21 incident to his arrest.

22 **B. The court grants in part defendant's motion to exclude evidence found in the**
 23 **defendant's jail cell.**

24 Defendant moves this court to suppress documents found in his jail cell arguing the
 25 search of his cell violated his Fourth Amendment rights. In the alternative, the defendant argues
 26 the evidence should be excluded under the attorney-client and/or work product privilege. ECF
 27 No. 32. The Government opposes the motion, arguing that the defendant does not have a Fourth
 28

1 Amendment right to privacy in his jail cell, and that he failed to meet his burden of establishing
 2 the documents were privileged. ECF No. 43.

3 It is well established that the defendant does not have a right to privacy in his individual
 4 jail cell. “Notwithstanding our caution in approaching claims that the Fourth Amendment is
 5 inapplicable in a given context, . . . society is not prepared to recognize as legitimate any
 6 subjective expectation of privacy that a prisoner might have in his prison cell and that,
 7 accordingly, the Fourth Amendment proscription against unreasonable searches does not apply
 8 within the confines of the prison cell.” *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984). Further,
 9 “[a] right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with
 10 the close and continual surveillance of inmates and their cells required to ensure institutional
 11 security and internal order.” *Id.* at 527-28. While it is well established that a prison regulation
 12 that infringes on a detainee’s constitutional rights must be “reasonably related to legitimate
 13 penological interests,” *Turner v. Safley*, 482 U.S. 78, 89 (1987), *Hudson* determined that random
 14 cell searches are reasonably related to the legitimate penological interest of finding contraband,
 15 *Hudson*, 468 U.S. at 528. Further, the defendant’s cited case law does not support a deviation
 16 from *Hudson* and its progeny.¹ Consequently, the court finds that the search of defendant’s jail
 17 cell did not violate his Fourth Amendment rights.

19 ¹ See *Thompson v. Souza*, 111 F.3d 694, 699-701 (9th Cir. 1997) (analyzing a prisoner’s Fourth
 20 Amendment right to be free from unreasonable searches of their person, in the context of a strip
 21 search, not the search of a jail cell); *Myron v. Terhune*, 225 Fed. Appx. 434, 438 (9th Cir. Feb. 7,
 22 2007) (defendant’s claim that his cell was searched without a warrant, in violation of the Fourth
 23 Amendment was “frivolous,” because “[t]he Supreme Court has explicitly held that ‘the Fourth
 24 Amendment has no applicability to a prison cell.’” (quoting *Hudson*, 468 U.S. at 536)); *United
 25 States v. Savage*, 482 F.2d 1371, 1373 (9th Cir. 1973) (“[A]bsent a showing of some justifiable
 26 purpose of imprisonment or prison security the interception and photocopying of the letter was
 27 violative of the fourth amendment and the [sealed] letter should have been excluded as evidence.”).

28 While the precedent would support finding the search unconstitutional if it was initiated by the
 29 prosecution, the record before the court does not support such a finding here. See *United States v.
 30 Cohen*, 796 F.2d 20, 24 (2d Cir. 1986) (“Were it a prison official that initiated the search of Barr’s
 31 cell, established decisional law holds that the search would not be subject to constitutional
 32 challenge, regardless of whether security needs could justify it.”). While the court finds it curious
 33 that Deputy Wallitner turned the seized documents over to Detective Lear, the deputy in charge of
 34 the defendant’s investigation, rather than his commanding officer, and appears to have searched
 35 the defendant’s cell after prohibiting the defendant from taking one of the seized documents to a

However, while the search itself may not violate an individual's Fourth Amendment rights, the documents seized in the search may be protected by either the attorney-client or work product privilege. *See e.g., Carter v. State*, 817 A.2d 277 (Md. Ct. Spec. App. Feb. 26, 2003) (finding that although the search of the defendant's jail cell and examination of the documents found therein was not a violation of the defendant's Fourth Amendment rights, admission of these documents, prepared at request of his counsel and protected by the attorney-client and work-product privilege, violated the defendant's Sixth Amendment right to counsel).

First, "[t]he attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice, . . . as well as an attorney's advice in response to such disclosures." *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997) (citations omitted) (emphasis in original). However, "[t]he fact that a person is a lawyer does not make all communications with that person privileged." *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002) (citing *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996)). "Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed." *Id.* (quoting *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981)). Generally, an eight-part test is used to determine whether information is covered by the attorney-client privilege:

- (1) Where legal advice of any kind is sought
- (2) from a professional legal adviser in his capacity as such,
- (3) the communications relating to that purpose,
- (4) made in confidence
- (5) by the client,
- (6) are at his instance permanently protected
- (7) from disclosure by himself or by the legal adviser,
- (8) unless the protection be waived.

United States v. Ruehle, 583 F.3d 600, 607 (9th Cir. 2009) (quoting *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 n.2 (9th Cir. 1992)). The party asserting the privilege bears the burden of proving each essential element and separating the privileged information from non-privileged information as blanket claims of privilege are generally disfavored. *See id.* at 609.

Here, the defendant has failed to meet his burden and prove that the information in the seized documents should be excluded under the attorney-client communication privilege. The

meeting with his attorneys, nothing in the record supports a finding that the search was directed by the prosecution's office. *See ECF No. 61, Evidentiary Hearing Testimony of Deputy Wallitner.*

1 defendant never referenced the well-established eight-part test in either his briefing on the issue
 2 or in the evidentiary hearing. He further failed to demonstrate that the documents contained legal
 3 advice or protected and confidential communications with counsel. Even though it was his
 4 burden, the defendant presented no witnesses or evidence during the evidentiary hearing. The
 5 court cannot therefore grant defendant's blanket request that all of the information seized from
 6 the cell be excluded under this privilege.

7 However, the court does find that some of the documents must be excluded under the
 8 work product privilege. "To qualify for work-product protection, documents must: (1) be
 9 'prepared in anticipation of litigation or for trial' and (2) be prepared 'by or for another party or
 10 by or for that other party's representative.'" *United States v. Richey*, 632 F.3d 559, 567 (9th Cir.
 11 2011) (quoting *In re Grand Jury Subpoena (Mark Torf/ Torf Env't Mgmt.)*, 357 F.3d 900, 907
 12 (2004)). "Although the work-product doctrine most frequently is asserted as a bar to discovery in
 13 civil litigation, its role in assuring the proper functioning of the criminal justice system is even
 14 more vital. The interests of society and the accused in obtaining a fair and accurate resolution of
 15 the question of guilt or innocence demand that adequate safeguards assure the thorough
 16 preparation and presentation of each side of the case." *United States v. Nobles*, 422 U.S. 225, 238
 17 (1975). The party claiming the protection bears the burden of demonstrating the applicability of
 18 the work product doctrine. *See Tornay v. United States*, 840 F.2d 1424,1426 (9th Cir. 1988)
 19 (citing *United States v. Hirsch*, 803 F.2d 493, 496 (9th Cir. 1986); *LightGuard Sys., Inc. v. Spot*
 20 *Devices, Inc.*, 281 F.R.D. 593, 598 (D. Nev. 2012).

21 Here, the defendant has met his burden and demonstrated that some of the seized
 22 documents are protected under the work-product privilege. The following documents are notes
 23 made during a meeting with his counsel, his reflections on that meeting, and were made in
 24 preparation of his defense:

- 25 • USAO 000282 – "Legal Process"
- 26 • USAO 000283 – "Timeline"
- 27 • USAO 000284 – "Witness"
- 28 • USAO 000285 – "Timeline 8/24"

- 1 • USAO 000287 – “Complaint Summary”

2 ECF No. 32-2; ECF No. 61, Evidentiary Hearing. These documents squarely fit within the work-
 3 product privilege and are, accordingly, excluded. USAO 000290 & 000291, the front and back of
 4 an envelope addressed to the defendant from the Federal Public Defenders office, contains
 5 handwritten notes that appear to be work-product; accordingly, these documents are excluded.

6 Three address books were also seized from defendant’s cell during the search and contain
 7 privileged documents. *See* ECF No. 32-2. The court finds that USAO 000296 contains
 8 information regarding the defendant’s case and is work-product; accordingly, it is excluded
 9 under the privilege. USAO 000306 & 000309 contain information regarding the defendant’s
 10 counsel and case which appear to be work product; accordingly, both are excluded. The third
 11 address book, labeled on the front inside cover as “Attorney/Client Work Product,” contains
 12 information and details clearly related to the defendant’s case and preparation for his defense.
 13 Accordingly, the court excludes the third address book in its entirety (USAO 000312 – 000318).

14 The Government articulated in its briefing that USAO 000288 & 000299 came from
 15 Zipp’s personal bin, the defendant’s cell mate. However, during the evidentiary hearing, Deputy
 16 Wallitner indicated that he did not keep the documents he seized from the inmates’ property bins
 17 separate. While the court agrees with the Government that any documents found in Zipp’s
 18 personal bin will not be excluded, because it has not been established that these documents did in
 19 fact come from Zipp and not the defendant, the court reserves ruling on the admissibility of
 20 USAO 000288 & 000299 until trial.

21 The court has reviewed the remaining documents and found they do not contain
 22 privileged information; accordingly, they are not excluded.

23 **III. CONCLUSION**

24 IT IS THEREFORE ORDERED that defendant’s motion to suppress evidence from
 25 defendant’s stop, arrest, and search of his vehicle (ECF No. 33) is **DENIED**.

26 IT IS FURTHER ORDERED that defendant’s motion to suppress or, in the alternative,
 27 motion to exclude from trial evidence seized from the defendant’s jail cell (ECF No. 32) is
 28 **GRANTED in part and DENIED in part** in accordance with this Order. Document numbers

1 USAO 000282–000285, 000287, 000290–000291, 000296, 000306, 000309, and 000312–
2 000318 are excluded.

3 IT IS FURTHER ORDERED that defendant's motion for early disclosure of *Jencks*
4 material and timely production of *Brady/Giglio* material (ECF No. 35), and defendant's motion
5 for reasonable notice of Federal Rule of Evidence 404(b) evidence (ECF No. 36) are **DENIED**
6 **as moot**. Because the proposed dates for disclosure have passed, the court assumes that the
7 parties have conferred, and all disclosures have been or will be properly and promptly made.

8 IT IS FURTHER ORDERED that because defendant has made no showing of relevance,
9 admissibility, and specificity, defendant's motion to inspect and produce files of federal law
10 enforcement agents and officers (ECF No. 38) is **DENIED without prejudice**. See *United States*
11 v. *Estes*, No. 3:15-CR-015-LRH-VPC, 2015 WL 5177819, at *6 (D. Nev. Sept. 4, 2015) (while
12 the government might later be found to have violated *Brady* for improperly withholding certain
13 documents, the court nonetheless cannot require the government to disclose all personnel records
14 without a showing of relevance, admissibility, and specificity). The defendant may renew his
15 motion should the need arise following the Government's *Henthorn* inquiry and proper
16 *Brady/Giglio* disclosures.

17 IT IS FURTHER ORDERED that defendant's motion to permit supplemental attorney
18 examination or questioning of prospective jurors (ECF No. 39) is **DENIED without prejudice**.
19 Supplemental examination by counsel will be considered at trial should the need arise during the
20 *voir dire* process.

21 The parties are reminded to follow the court's Order Regarding Trial (ECF No. 45) for
22 subsequent filings as the parties prepare for trial.

23
24 IT IS SO ORDERED.

25 DATED this 29th day of July, 2019.
26


27 LARRY R. HICKS
28 UNITED STATES DISTRICT JUDGE